Supreme Court, U.S.
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No. 97-1371

In the Supreme Court of the United States

OCTOBER TERM, 1997

DAVID DUFFY, PETITIONER

v.

CHARLES R. WOLLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether under the facts of this case the court of appeals erred in holding that the district court did not abuse its discretion in denying petitioner's motion for discovery under Rule 56(f) of the Federal Rules of Civil Procedure before ruling upon the motion for summary judgment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Burns v. *Gadsden State Community College*, 908 F.2d 1512 (11th Cir. 1990)	8
Bush v. *Lucas*, 462 U.S. 367 (1983)	3, 9
Butz v. *Economou*, 438 U.S. 478 (1978)	8
Evans v. *Technologies Applications & Service Co.*, 80 F.3d 954 (4th Cir. 1996)	7
Gardner v. *Howard*, 109 F.3d 427 (8th Cir. 1997)	4
Meloff v. *New York Life Ins. Co.*, 51 F.3d 372 (2d Cir. 1995)	7
Schweiker v. *Chilicky*, 487 U.S. 412 (1988)	3, 9
United States v. *Light*, 766 F.2d 394 (8th Cir. 1985)	4
Vance v. *United States*, 90 F.3d 1145 (6th Cir. 1996)	8
Wichita Falls Office Assoc. v. *Banc One Corp.*, 978 F.2d 915 (5th Cir. 1992)	7

Constitution and rules:

U.S. Const. Amend. V	2
Fed. R. Civ. P.:	
Rule 56	9
Rule 56(f)	3, 4, 5, 6, 7, 8, 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 123 F.3d 1026. The opinion of the district court (Pet. App. 31-48) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1997. The court of appeals denied a timely petition for rehearing on October 29, 1997. Pet. App. 49. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1993, the United States District Court for the Southern District of Iowa announced

a vacancy in the position of Chief Probation Officer. The court established a panel of three judges to make the selection from among the applicants, after the applicants were reviewed by a screening committee. The panel was comprised of Chief Judge Charles R. Wolle, Judge Harold D. Vietor, and Judge Ronald E. Longstaff. The screening committee submitted three candidates, including petitioner, to the panel. The panel selected a female applicant, Jane McPhillips. Pet. App. 1-8.

2. Petitioner then brought this civil action against the panel members (respondents here), seeking injunctive and monetary relief. Pet. App. 9.[1] Petitioner claimed that respondents violated his Fifth Amendment due process and equal protection rights by failing to offer him the chief probation officer position. Petitioner asserted that McPhillips was a less qualified candidate and that she was selected based upon her gender. *Ibid.*

Respondents moved to dismiss or in the alternative for summary judgment. Respondents each explained by affidavit that McPhillips was selected for nondiscriminatory reasons. Those reasons included McPhillips's experience, education, and demeanor during her interview, as well as the strong recommendations of jurists familiar with McPhillips's work. Pet. App. 9-10, 22-27.

In response, to support his allegation of discrimination, petitioner alleged that: (1) McPhillips was substantially less qualified; (2) Chief Judge Wolle had

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[1] Petitioner did not seek redress through the administrative process provided for by the Equal Employment Opportunity Plan in place in the Southern District of Iowa. Pet. App. 9, 37-38.

mentioned an interest by someone in the Administrative Office of the United States Courts in the recruitment of a female; and (3) two members of the Panel had usually hired female law clerks. Pet. App. 21. Petitioner also filed an affidavit under Rule 56(f) of the Federal Rules of Civil Procedure, seeking to delay the court's ruling until he could depose respondents to determine whether their stated reasons for hiring McPhillips were pretextual. *Id.* at 71-73.

3. The district court denied petitioner's request to depose respondents, finding that petitioner had not shown that discovery "would aid his case." Pet. App. 47. The court then granted summary judgment in favor of respondents.[2] The court reviewed the evidence submitted by petitioner and found that it did not support a finding of pretext. *Id.* at 46-48.

4. On appeal, the Eighth Circuit affirmed. The court of appeals carefully reviewed all of the record and agreed with the district court that petitioner's submissions did not support a reasonable inference of discrimination. Pet. App. 1-15, 21-28. The court concluded that the case "presents no questions of material fact left in dispute," and "the district court properly granted summary judgment to [respondents]." *Id.* at 28.

The court of appeals also held that the district court did not abuse its discretion in finding that

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[2] The district court denied respondents' claim of absolute immunity. Pet. App. 4, 42. The court also rejected respondents' argument that petitioner's *Bivens* action was precluded under *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988), and *Bush* v. *Lucas*, 462 U.S. 367 (1983), based upon the existence of an alternative remedial scheme and "special factors." Pet. App. 34-39. The court of appeals affirmed the district court's rulings on both of those issues. *Id.* at 12-15.

discovery was not warranted before ruling upon the motion for summary judgment. Pet. App. 28-30. The court explained: "Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its pro[t]ections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." Pet. App. 28-29 (quoting *United States* v. *Light*, 766 F.2d 394, 397 (8th Cir. 1985) (per curiam)).

The court of appeals quoted the Rule 56(f) affidavit of petitioner's counsel, which stated that "[u]ntil [petitioner] conducts discovery and specifically has the opportunity to depose each of the Defendants he is not in a position where he can reasonably make a presentation that the Plaintiff's [sic] explanations for their actions are a pretext for unlawful discrimination." Pet. App. 29. The court of appeals agreed with the district court that that bare affidavit was insufficient to postpone the grant of summary judgment. *Id.* at 28-30. The court observed that petitioner "has made no supportable allegations of discrimination, and it is well settled that 'Rule 56(f) does not condone a fishing expedition' where a plaintiff merely hopes to uncover some possible evidence of a constitutional violation." *Id.* at 29-30 (quoting *Gardner* v. *Howard*, 109 F.3d 427, 431 (8th Cir. 1997). Thus, the court of appeals concluded, "the district court did not abuse its discretion in declining to compel discovery in this case." *Id.* at 30.

ARGUMENT

The court of appeals correctly affirmed the grant of summary judgment for respondents. The court of appeals' ruling on that point is fact-bound and does not raise any issue of law warranting this Court's review. Nor does the court of appeals' approach to Rule 56(f) of the Federal Rules of Civil Procedure conflict with the decision of any other court of appeals. Accordingly, certiorari should be denied.

1. The court of appeals properly concluded that petitioner's submissions were insufficient to support his claim of sex discrimination, and properly affirmed the district court's grant of summary judgment. Respondents each submitted affidavits explaining the legitimate nondiscriminatory reasons why Ms. McPhillips was considered a more qualified candidate than petitioner. In response, petitioner could not adequately support his allegation of sex discrimination.

Petitioner relied upon three allegations as demonstrating sex discrimination: "(1) McPhillips was substantially less qualified than [petitioner]; (2) Chief Judge Wolle had mentioned an interest by someone in the Administrative Office in the recruitment of a female; and (3) two members of the Panel had usually hired female law clerks." Pet. App. 21. As to the first allegation, the court of appeals held that the record did not support the claim that McPhillips was less qualified than petitioner. *Id.* at 22-23. The court agreed that, under appropriate non-discriminatory criteria, "McPhillips was the stronger candidate." *Id.* at 23.

As to the second allegation, the district court explained that the evidence submitted by petitioner "shows only that [respondents] were encouraged [by

the Administrative Office] to conduct a sufficiently comprehensive search that women and minority candidates were represented in the applicant pool." Pet. App. 48 n.6. The court of appeals correctly held that "the Administrative Office's alleged interest in obtaining a diverse pool of applicants can[not] support a finding of pretext," *id.* at 23, because "[a]n employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination," *id.* at 24. See also *id.* at 25-26 ("An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment. * * * This, of course, is not an appropriate objection * * * and does not state a cognizable harm.") (internal quotation marks and citations omitted).

Finally, the court correctly held that petitioner's assertion that two of the respondents had hired more female judicial law clerks than male judicial law clerks did not support his claim of sex discrimination by the three-member panel in selecting the Chief Probation Officer. Pet. App. 25-26.

Thus, the court of appeals' decision here is correct. Moreover, it does not establish any significant legal precedent warranting this Court's review, and it does not conflict with the ruling of any other court.

2. The court of appeals also properly held that the district court's denial of petitioner's request to depose respondents was not an abuse of discretion. Under Rule 56(f) of the Federal Rules of Civil Procedure, a party may seek to postpone the ruling on a motion for summary judgment by demonstrating that discovery is necessary in order to oppose the motion. The courts of appeals agree that a Rule 56(f) affidavit

must explain "(1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." *Meloff* v. *New York Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995). Here the Rule 56(f) affidavit contained none of those required elements. Instead, it was a conclusory request to depose respondents. Such a "fishing expedition" is not appropriate under any standard.

The alleged circuit conflict on the interpretation of Rule 56(f) (see Pet. 15-17) is wholly illusory. As an initial matter, the court of appeals here did not purport to be adopting any general interpretation of Rule 56(f). Rather, the court simply held that on the record of this case, it was not an abuse of discretion for the district court to deny the depositions and rule upon the summary judgment motion.

The reasoning of the cases cited by petitioner does not conflict with the ruling below. For example, in *Evans* v. *Technologies Applications & Service Co.*, 80 F.3d 954, 961 (4th Cir. 1996), cited by petitioner (Pet. 16), the court explained that "[a] party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit." 80 F.3d. at 961. See also *Wichita Falls Office Assoc.* v. *Banc One Corp.*, 978 F.2d 915, 920 (5th Cir. 1992) ("It is clear that the non-moving party may not rely merely on vague assertions that discovery will produce some unrelated, unspecified facts."). In the other cases cited by petitioner, where allowance was made for discovery, the party opposing summary

judgment filed an adequate affidavit explaining what facts were sought, and how they would be obtained. See *e.g.*, *Vance* v. *United States*, 90 F.3d 1145, 1150 (6th Cir. 1996) ("[The party opposing summary judgment] provided all of the information required by [Rule 56(f)]. Dr. Vorhous set forth precisely what discovery was needed and why it was needed, all based on a meticulous review of Vance's medical records.").[3]

Here, in contrast, petitioner had no legitimate basis for his sex discrimination claim, and his Rule 56(f) affidavit contained only a conclusory statement that the deposition of respondents would allow him to show that the stated legitimate reasons for the hiring of McPhillips were pretextual. Pet. App. 72. In these circumstances, it was not an abuse of discretion to deny the depositions.

3. Contrary to petitioner's contention, neither the court of appeals nor the district court employed special rules, beyond the Federal Rules of Civil Procedure, in denying further discovery here. The district court cited this Court's statement that a "firm application of the Federal Rules" is appropriate when public officials are sued in their individual capacities. Pet. App. 48 (quoting *Butz* v. *Economou*, 438 U.S. 478, 508 (1978)). The court of appeals agreed with that proposition, and noted that the same policies that support the firm application of the Federal Rules when other public officials are sued apply when judges

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[3] One case cited by petitioner, *Burns* v. *Gadsden State Community College*, 908 F.2d 1512 (11th Cir. 1990), does not even discuss Rule 56(f). Rather, the court held that there was direct evidence of discrimination that supported the plaintiff's claims, and that, therefore, the grant of summary judgment for the defendants was improper.

are named as defendants. Pet. App. 27-28. Neither court, however, purported to apply special rules to this case.[4] The district court and court of appeals applied Rule 56 and held that there was no material issue of fact presented and that petitioner's affidavit did not warrant delay in the ruling on the motion to permit petitioner to depose respondents. The decisions below regarding the application of Rule 56 are both correct and do not present any issue of law that warrants review by this Court.[5]

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[4] The question of what rules (regarding discovery, Rule 56(f), and standards of proof) apply in motive-based cases where the defendant asserts qualified immunity is currently pending before this Court in *Crawford-El* v. *Britton*, No. 96-827 (argued Dec. 1, 1997).

[5] The court of appeals rejected respondents' argument that petitioner's *Bivens* claim was precluded under *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988), and *Bush* v. *Lucas*, 462 U.S. 367 (1983), based upon the existence of an alternative remedial scheme and "special factors." We disagree with the court of appeals' ruling on that issue. Congress has vested the coordinate Judicial Branch with the primary responsibility for administering its personnel matters. Under that authority, the District Court for the Southern District of Iowa has established an administrative process for the presentation, investigation and resolution of claims of discrimination. If an aggrieved employee is successful in pursing such a claim, the employee may obtain equitable relief, and may, in some instances, also be entitled to monetary relief under the Back Pay Act. Thus, the court of appeals' decision could be affirmed on the ground that a *Bivens* claim is precluded in this context. We note that the same issue is currently pending in at least two other circuits. See *Lee* v. *Hughes*, No. 97-8423 (11th Cir.); *DeMello* v. *Ney*, No. 97-15205 (9th Cir.); *Blankenship* v. *McDonald*, 97-35898 (9th Cir.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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